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IN THE

Supreme Court of the United States

October Term, 1970.

70-115

No. ~~1558~~

DONALD R. McVEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No.

DONALD R. McVEAN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Petitioner, Donald R. McVean, respectfully prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals, Fifth Circuit entered on January 14, 1971 affirming the judgment and sentence of the United States District Court for the Middle District of Florida.

OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Fifth Circuit is set out in the Appendix *infra* p. A1, in its entirety, together with a copy of the order denying rehearing entered on the 10th day of March 1971, Appendix p. A9.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1257(3).

QUESTIONS PRESENTED.

1. Whether "unabashed forum shopping" between state and federal officers deprives a defendant of his Constitutional rights.

2. Whether evidence obtained by state police officers by use of a search warrant, illegal in the state where issued, can be introduced in a subsequent federal trial alleging the violation of a federal criminal law where the state requirements for the issuance of a search warrant exceed those of the federal law.

STATEMENT OF THE CASE.

Petitioner, Donald R. McVean, is hereinafter usually referred to as the defendant. On May 17, 1968 at about 6:30 P. M., Joe Wood, a close friend of the defendant for over a month, came to the defendant's mother's home where the defendant resided and was admitted by the defendant as he had been on numerous prior occasions. Shortly after he was admitted, two deputy sheriffs forced their way into the home with a search warrant and arrested the defendant and incarcerated him in the county jail. Later it was learned that his friend, Joe Wood, was actually Joseph Canali, a 24 year old police officer of the City of St. Petersburg.

Donald R. McVean was charged in the Florida State Circuit Court with, in addition to other charges, selling to Officer Canali a hallucinogenic drug on May 13, 1968; possession of a hallucinogenic drug on May 17, 1968 and selling to Officer Canali a hallucinogenic drug on May 17, 1968. These charges were dismissed in the state court on November 27, 1968 after counsel for the co-defendant, John Van De Steeg, successfully argued the invalidity of the search warrant.

Informations were filed on October 24, 1969 by the United States Attorney in the United States District Court for the Middle District of Florida, charging both Van De Steeg and McVean with the unlawful possession and unlawful sale of STP, a hallucinogenic drug within the meaning of 21 U. S. C. § 321(v)(3) in violation of 21 U. S. C. § 331(q)(2).

Prior to the trial the petitioner filed a motion to quash the search warrant and to suppress the evidence obtained thereby. The Motion was denied by the trial judge. A copy of said motion is set forth in the Appendix, *infra*, p. A10.

McVean was arrested in the latter part of December, 1969, More Than Nineteen Months After the Alleged Violation, and incarcerated in the federal prison.

The trial was held on June 2, 1970, More Than Two Years After the Alleged Violation, and resulted in a verdict and judgment thereon of guilty and McVean was sentenced to serve two consecutive one-year terms in the custody of the Attorney General. Charges against the co-defendant, Van De Steeg, were inexplicably dismissed the day prior to trial.

REASONS FOR GRANTING THE WRIT.

I.

"Unabashed Forum Shopping" Between State and Federal Officers Should Be Declared Unconstitutional.

Justice Simpson, in his concurring opinion set forth in the Appendix, *infra,* p. A7, labeled this set of facts as ". . . another example of the sort of 'unabashed forum shopping' . . . (that) . . . is not forbidden under the present state of the decisions." Petitioner feels that the cases of *Klopfer v. North Carolina,* 386 U. S. 213, 18 L. Ed. 2d 1, 87 S. Ct. 988 and *Lassiter v. Turner,* 423 F. 2d 897 (1970) do indeed forbid this practice when, as in the *Lassiter* case the Court stated that ". . . the length of delay created a reasonable possibility of prejudice and the right to a speedy trial had been denied and the prosecution must be dismissed. . . ."

This form of "unabashed forum shopping" should be declared unconstitutional by this Court.

II.

Evidence Obtained by State Police Officers by Use of a Search Warrant, Illegal in the State Where Issued, Should Not Be Allowed to Be Introduced in a Subsequent Federal Trial Alleging Violation of a Federal Criminal Law Where the State Requirements for the Issuance of a Search Warrant Exceed Those of the Federal Law.

The one fact overlooked by the majority opinion in *United States v. McVean, infra,* Appendix, p. A1, was that on May 17, 1968, the date the search warrant here in question was issued, neither the sale nor the possession of

Methyl-Dimethoxy-Alpha-Methyl-Phenethylamine was illegal under the laws of the state of Florida.

The Affidavit upon which the search warrant was issued alleged the violation of the ". . . drug abuse laws of the State of Florida. . . ." A copy of said Affidavit is set forth in the Appendix, *infra,* page A13.

Florida Statutes 933.18 entitled—*When warrant may be issued for search of private dwelling*—stated, in part, the following:

> "No search warrant shall issue under this chapter or under any other law of this state to search any private dwelling occupied as such unless it is being used for the unlawful sale, possession or manufacture of intoxicating liquor, or stolen or embezzled property is contained therein, or it is being used to carry on gambling, or it is being used to perpetrate frauds and swindles, *or the laws relating to narcotics are being violated therein.* . . ." (Amended effective May 15, 1969 to include ". . . or drug abuse . . ." after the word "narcotics").

The Florida Drug Abuse Law, Florida Statute Chapter 404 at Section 404.01—Definitions—subsection (1) states as follows:

> ". . . except that this law shall not apply to narcotics, as now or hereafter defined by the Legislature of Florida, or bromides. . . ."

In a similar case, *Panzavecchia v. State,* 201 So. 2d 762, the Florida court held that the affidavit and search warrant must show probable cause on its face that one of the specific violations mentioned in Florida Statutes 933.18 is occurring or has occurred in the dwelling house.

Florida Statute 404.01(3) commonly known as the Florida Drug Abuse Law incorporated by reference ". . . any other drug to which the drug abuse laws of the United States apply . . ." and this admittedly was the only section of said statute by which the government attempted to uphold the questioned search warrant under Florida Statute 933.18 to show that ". . . a weapon, instrumentality or means by which a felony has been committed is contained therein. . . ."

STP or DOM, the popular and trade names respectively of the drug, Methyl-Dimethoxy-Alpha-Methyl-Phenethylamine, was first listed in the Federal Register on February 2, 1968 and did not become illegal until April 2, 1968. The Florida Drug Abuse Law (F. S. 404.01) became a law effective July 1, 1967 and, as of this date, has not been amended.

Had the sale or possession of STP or DOM been declared illegal by the Federal Government prior to July 1, 1967, the effective date of the Florida Drug Abuse Law, the search warrant may have been legal since the possession or sale of STP or DOM would have been illegal at that time, but on May 17, 1968 the sale and/or possession of STP or DOM was not illegal under the laws of the state of Florida and therefore the affidavit upon which the search warrant was issued did not allege that an instrumentality or means by which a felony had been committed was contained in the defendant's home under the law of the state of Florida.

Since the Florida Drug Abuse Law did not attempt to delegate to the Congress of the United States the right to declare, in the future, drugs which the possession or sale of would later become illegal,[1] the possession or sale of

1. An attempted delegation which would clearly have made the Statute unconstitutional. *Hutchins v. Mayo,* 197 So. 295; *Florida Industrial Commission v. State,* 21 So. 2d 599.

STP or DOM was not illegal in the state of Florida in 1968.

It is well settled law in Federal Jurisprudence that a state may impose higher standards on searches and seizures than those required by the Federal Constitution. The conflict arises when the states impose lesser standards. *Cooper v. California,* 386 U. S. 58, 17 L. Ed. 2d 730, 87 S. Ct. 788, reh. and modif. den. 386 U. S. 988, 18 L. Ed. 2d 243, 87 S. Ct. 1283.

The State of Florida required that the affidavit in support of a search warrant must allege a violation of the narcotics laws of that State. The affidavit may have alleged a violation of the Florida Drug Abuse Law but the State Court held that insufficient prior to the amendment of May 15, 1969, thus imposing higher standards for the issuance of a search warrant than any known in Federal Jurisprudence.

CONCLUSION.

In view of the considerations set forth above, I respectfully submit that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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Attorney for Petitioner.

April, 1971

Appendix.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT.

No. 30330.
SUMMARY CALENDAR.*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD RUTHERFORD McVEAN,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA.

(January 14, 1971)

Before WISDOM, COLEMAN, and SIMPSON, *Circuit Judges.*

WISDOM, *Circuit Judge:*

Donald Rutherford McVean was convicted by a jury on a two-count criminal information charging him[1] with the

* Rule 18, 5th Cir.; See Isbell Interprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F. 2d 409.

1. The information filed on October 24, 1969, by the United States Attorney for the Middle District of Florida also named as a defendant one John Van de Steeg. On June 1, 1970, however, the United States Attorney dismissed the charge against Van de Steeg.

unlawful possession and unlawful sale of STP,[2] a hallucinogenic drug within the meaning of 21 U. S. C. § 321(v)(3), in violation of 21 U. S. C. §§ 331(q)(3) and 331(q)(2). He was sentenced to serve two consecutive one-year terms in the custody of the Attorney General. We affirm.

On May 13, 1968, Officer Joseph Canali of the St. Petersburg Police Department, an undercover narcotics agent, met with Donald Rutherford McVean at McVean's home in St. Petersburg, Florida. There McVean sold Officer Canali two drug tablets for $20. The St. Petersburg Police Department then submitted the tablets to a chemist employed by the State of Florida for an analysis. The chemist's report indicated that the tablets contained STP. On the basis of Canali's affidavit that he had purchased the two STP tablets from McVean, the St. Petersburg Police Department secured a warrant to search the McVean residence. On May 17 Canali went back to McVean's home to buy a larger quantity of STP, ostensibly for resale. Shortly after the transaction was completed, several other police officers, armed with the search warrant, arrived at the McVean residence. After having been admitted into the house, they proceeded to arrest McVean. They also recovered from his person $260 of the marked money that the St. Petersburg Police Department had given Officer Canali with which to make the purchase. Canali later submitted the tablets that McVean had sold him for analysis. The chemist's report concluded that the tablets were indeed STP.

I.

McVean argues first that the exclusion from federal juries of persons between the ages of 18 and 21 denies him the right to be tried by a jury of his peers. The thrust of

2, "STP" is the popular name for methyl-dimethoxy-alpha-methyl-phenethylamine; "DOM" is the drug's trade name.

this argument seems to be that accused persons within that age group, such as McVean, are deprived of the constitutional right of adults to a jury of their peers without being given the compensating special protections afforded juveniles. Significantly, McVean can cite no cases to support his argument.

It is the declared policy of the United States that all litigants in the federal courts who are entitled to a jury trial shall have their juries selected at random from a "fair cross-section of the community." 28 U. S. C. § 1861, as amended March 27, 1968, Pub. L. 90-274 § 101, 82 Stat. 54. But it has never been thought that federal juries must be drawn from a cross-section of the *total* population without the imposition of any qualifications. *See, e.g., United States v. Valentine,* D. P. R. 1968, 288 F. Supp. 957, 965.

The current statute delineating the qualifications of federal jurors, 28 U. S. C. § 1865, as amended, March 27, 1968, Pub. L. 90-274 § 101, 82 Stat. 58, provides that any person may be deemed qualified to serve on a federal jury unless he "is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district" or unless he suffers from any of the other disabilities listed in the statute. The Ninth Circuit has recently held in a Selective Service case that the statutory exclusion of minors from a jury panel did not violate the defendant's constitutional rights. *United States v. Tantash,* 9 Cir. 1969, 409 F. 2d 227, 228, *cert. den'd,* 395 U. S. 968, 89 S. Ct. 2115, 23 L. Ed. 2d 754. *See also George v. United States,* 9 Cir. 1952, 196 F. 2d 445, *cert. den'd,* 344 U. S. 843, 73 S. Ct. 58, 97 L. Ed. 656. The First Circuit in dictum has approved the holding in the *Tantash* case. *United States v. Butera,* 1 Cir. 1970, 420 F. 2d 564, 570 n. 15. We agree with those courts and hold that McVean has not been deprived of any rights guaranteed him by the Fifth and

Sixth Amendments simply because Congress has chosen to limit eligibility to serve on federal juries to those persons who are 21 years or older.

II.

Second, McVean contends that the search warrant under which the arresting officers entered his home was invalid under Florida law and that any evidence obtained as a result could not be used in a subsequent federal proceeding. McVean is right, of course, when he argues that federal authorities can not use in a federal criminal proceeding evidence that state officers have obtained illegally. *See Elkins v. United States,* 1960, 364 U. S. 206, 80 S. Ct. 1437, 4 L. Ed. 2d 1669. Nevertheless, we cannot agree that the search warrant under which the arresting officers entered McVean's home was invalid.

The Florida legislature has enumerated the circumstances in which the state officers may secure a warrant to search a private dwelling:

> No search warrant shall issue . . . to search any private dwelling occupied as such unless it is being used for the unlawful sale, possession or manufacture of intoxicating liquor, or stolen or embezzled property is contained therein, or it is being used to carry on gambling, or it is being used to perpetrate frauds and swindles, or the laws relating to narcotics are being violated therein, or a weapon, instrumentality or means by which a felony has been committed is contained therein . . .

Florida Statutes § 933.18. The Florida state courts have held that in order to be valid the affidavit and search warrant must show on its face that the police have probable cause to believe that one of specific violations enumerated

in § 933.18 is occurring or has occurred in the house. *See Panzavecchia v. State,* Fla. App.—3 Dist. 1967, 201 So. 2d 762.

McVean argues that the affidavit upon which the search warrant was issued alleged a violation of the Florida drug abuse laws. He points out that by statutory definition the substances to which the Florida drug abuse laws apply do not include narcotics. *See* Florida Statutes § 404.01. This distinction between narcotics and other dangerous drugs, he argues, has been carried over into the statute authorizing search warrants. Thus, although § 933.18 authorizes the issuance of a warrant to search a house if the police have probable cause to believe that the laws relating to narcotics are being violated therein, in McVean's view it does not authorize the issuance of a warrant to search a house if the police merely believe that the drug abuse laws are being violated therein. In support of his argument, McVean points out that the Florida legislature amended § 933.18 in 1969 to include a violation of the drug abuse laws among the conditions for the issuance of a search warrant. *See* Florida Statutes § 933.18, as amended, May 15, 1969, Laws 1969, c. 69-18, § 1.

The Government, on the other hand, argues that when the Florida legislature authorized the issuance of a warrant to search a house if "the laws relating to narcotics are being violated therein," it had in mind the whole family of dangerous drugs—not only opium, cannabis, etc., but also hallucinogens such as STP. The Government also points to the 1969 amendment to § 933.18 for support; the amendment, it says, was merely a later expression of what the legislature had always intended.

To decide this case, we need not answer the question whether the term "narcotics" as originally used in § 933.18 also includes hallucinogens. The statute itself provides a ready answer to McVean's contention that the search war-

rant was improperly issued. The final clause of that part of § 933.18 quoted above allows the issuance of a search warrant whenever the police have probable cause to believe that the "means by which a felony has been committed" is present in the house. The sale or possession of STP in violation of the Florida drug abuse laws is a felony, inasmuch as it is punishable by a term in the state penitentiary. *See* Florida Statutes § 404.15. The STP tablets themselves thus constitute the "means" by which such felonies are committed. Canali's affidavit establishes that the St. Petersburg police had probable cause to believe that the Florida drug abuse laws "have been and are being violated" on the McVean premises and that STP tablets—the means by which those violations were being committed—could be found at the McVean house. Since we have concluded that the search warrant was properly issued under Florida law and since there can be no federal constitutional objections to the issuance of the warrant, it necessarily follows that the district court did not err in refusing to suppress any evidence obtained as a result of the search.

III.

Finally, McVean contends that the Government committed reversible error by continually inquiring into an alleged sale of STP by McVean on May 13, 1968, an incident irrelevant to the crime charged, a sale of STP on May 17. He argues that under the rule in *Johnson v. United States*, 1943, 318 U. S. 189, 63 S. Ct. 549, 87 L. Ed. 704, the Government may not in a criminal prosecution inquire into a collateral crime unconnected with the offense charged. Therefore, he argues, the district court erred in not granting his repeated motions for a mistrial. We cannot agree.

It is well established that evidence of another crime may be admitted if it is substantially relevant for some

purpose other than to show the probability that the defendant committed the crime charged because he is a man of criminal character. *See e.g., United States v. Bradwell,* 2 Cir. 1968, 388 F. 2d 619, 622; *United States v. Bozza,* 2 Cir. 1966, 365 F. 2d 206, 213. The Government introduced Officer Canali's statements concerning the events of May 13 to establish probable cause for the issuance of the search warrant. The search warrant, in turn, provided the St. Petersburg police officers with their lawful authority to be in the McVean home on the evening of May 17. While at the McVean home, the officers witnessed the recovery from McVean of the marked money following his transaction with Officer Canali. The Government contends that this corroborative testimony was vital to establish McVean's guilt beyond a reasonable doubt. None of that testimony could have been admitted unless the proper predicate had been laid; indeed, the Government argues, unless the proper predicate had been laid, McVean would have forcefully objected to the admission of the police officers' testimony. The predicate in this case included the evidence of the search warrant itself and the testimony establishing the validity of the warrant. We agree with the Government's position and therefore conclude that the district court did not err in admitting Officer Canali's testimony concerning the events of May 13.

The judgment of the district court is AFFIRMED.

SIMPSON, *Circuit Judge,* (concurring specially):

I concur without reservation in Parts I and III of the Court's opinion.

As to Part II, I concur specially on the basis of my special concurrence in *United States v. Navarro,* 5 Cir. 1970,

429 F. 2d 928, 932. It is unnecessary to repeat the views there expressed. Based on a purchase of STP on May 13, 1968, the state search warrant was issued May 17, 1968, and a state arrest was made that day. The state charges were dismissed as to McVean on November 27, 1968, after pending for more than six months in the state courts. Although the matter is not clearly spelled out in the record here, the inference is clear that the holding in *Panzavecchia v. State,* DCA 3rd Dist., Fla., 1967, 201 So. 2d 762, was an effective bar to the state proceedings. There were no further proceedings for eleven months, until October 24, 1969, when the U. S. Attorney for the Middle District of Florida filed the information under Title 21, U. S. C., Sections 321-(v), 331(q)(3) and 331(q)(2) upon which McVean was tried and convicted June 2 and June 3, 1970.

This is another example of the sort of "unabashed forum shopping", *Navarro, supra,* page 932, between state and federal officers, which should not continue to receive judicial sanction. See the special concurrence of Mr. Justice Goldberg in *Cleary v. Bolger,* 1963, 371 U. S. 392, 404, 93 S. Ct. 385, 392, 9 L. Ed. 2d 390, 398. I recognize however that the practice is not forbidden under the present state of the decisions.

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

OFFICE OF THE CLERK

March 10, 1971

EDWARD W. WADSWORTH
Clerk

Room 408-400 Royal St.
New Orleans, La. 70130
(504) 527-6514

To All Parties Listed Below

Re: No. 30330 — U. S. A. v. McVean

Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By FRANCES WOLFF,
Deputy Clerk

cc: Mr. Lemuel S. Hunnicutt
Mr. Hugh N. Smith

THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION.

No. 69-156-Cr. T

UNITED STATES OF AMERICA

v.

DONALD R. McVEAN,
JOHN PALMER VANDESTEEG

MOTION TO QUASH SEARCH WARRANT AND TO SUPPRESS.

Come now the Defendants in the above styled cause, DONALD R. McVEAN and JOHN PALMER VANDESTEEG, by and through their undersigned attorneys, and bring this Motion to Quash Search Warrant and to Suppress and in support thereof would show unto this Honorable Court:

1. That heretofore, on the 17th day of May, 1968, Justice of the Peace for District No. 1 issued a search warrant for the search of a dwelling house located at 3300 Overlook Drive N. E., St. Petersburg, Florida. That said search warrant was issued in violation of the provisions of Florida Statute 933.18 and in violation of the provisions of the Fourth and Fourteenth Amendments to the United States Constitution and Section 22 of the Florida Declaration of Rights.

2. That Defendants would show that the affidavit and the search warrant based thereon purport to be based upon possession and sale of a substance forbidden to be possessed or sold under the Florida Drug Abuse Law and that such act was being violated in the dwelling house described in said warrant. Copies of said affidavit and search warrant are attached hereto as Defendants' Exhibits "A" and "B".

3. That said warrant and affidavit based upon such alleged facts are insufficient as a matter of law to authorize the search of a dwelling house inasmuch as the affidavit and search warrant do not purport to be issued for the search of the dwelling house for a violation of the narcotics laws of the State of Florida.

4. That part of the things seized at the time of said search included a quantity of Methyl-Dimethoxy-Alpha-Methyl-Phenethylamine, commonly known as STP which is not a narcotic drug under the applicable definitions and provisions of Florida Statute Chapter 398.

5. That said warrant based upon such facts as insufficient as a matter of law to authorize the search of a dwelling house pursuant to the holding of the case of *Panzavacchia v. State,* 201 So. 2nd 762, where the Court held that the search warrant and affidavit must show probable cause on its face; that one of the specific violations mentioned in Florida Statute 933.18 is occurring or has occurred in the dwelling house.

6. That the affidavit and search warrant issued pursuant thereto in the instant cause contain no showing that any of the specific violations named in Florida Statute 933.18 had occurred or were occurring in the aforesaid dwelling.

7. That said illegal search and seizure was made for the purpose of enforcing state law, by state officers without

federal participation and is therefore inadmissible in the pending federal action. *Elkins v. United States,* 364 U. S. 206, 80 S. Ct. 1437.

WHEREFORE, the affidavit being insufficient to support the search warrant and the warrant being insufficient on its face and the search, therefore, being illegal and unreasonable, Defendants pray that the evidence seized at the time of the search of the dwelling house aforesaid be suppressed and that the search warrant be quashed.

WE DO HEREBY CERTIFY that a copy of the above and foregoing Motion to Quash Search Warrant and to Suppress has been furnished, by mail, to the Hon. John L. Briggs, United States Attorney, 305A U. S. Courthouse & Post Office Bldg., Tampa, Florida, this — day of November, 1969.

LEMUEL S. HUNNICUTT,
447 Third Avenue North,
St. Petersburg, Florida. 33701
Attorney for Defendant
Donald R. McVean.

BILLY ROBERT BARR,
Attorney for Defendant
John Palmer Vandesteeg.

IN THE JUSTICE OF THE PEACE COURT
FIRST DISTRICT, PINELLAS COUNTY
STATE OF FLORIDA.

AFFIDAVIT FOR SEARCH WARRANT.

Before me, the Judge in and for the above entitled Court, personally came Officer Joseph Canali, to me well known, and who being by me first duly sworn, an oath deposes and says:

That deponent herein now is and at all times as hereinafter mentioned was a Police Officer in and for the City of St. Petersburg, Pinellas County, State of Florida, that deponent makes this application to the Judge of the above entitled Court for a Search Warrant to search a certain two story, masonry single family dwelling, color white with a greenish roof, said dwelling being located on the west side of Overlook Drive North East, facing east, and being the first building north of the Snell Isle Shore Acres Bridge, having the address of 3300 Overlook Drive North East, City of St. Petersburg, County of Pinellas, State of Florida.

The deponent herein has personal knowledge that the drug abuse laws of the State of Florida, relative to the illegal sale and possession of a hallucinogenic drug commonly known as STP (trade name DOM, chemically known as Methyl-Dimethoxy-Alpha-Methyl-Phenethylamine) are being violated in the above described dwelling by a white male whose name is known to the deponent as DON MCVEAN. The deponent herein bases his personal knowledge, as aforesaid, on the following facts, to wit:

On May 13, 1968, the deponent entered the above described dwelling and purchased two yellow tablets from Don McVean, said tablets were later analyzed and determined to be a hallucinogenic drug commonly known as

STP (trade name DOM, chemically known as Methyl-Dimethoxy-Alpha-Methyl-Phenethylamine).

WHEREAS, the affiant prays that a Search Warrant be issued according to law, commanding the Sheriff and/or Deputy Sheriffs or Constables of Pinellas County, either in the day time or the night time, and on any day of the week, including Sunday, with proper and necessary assistance to search the above described dwelling and curtilage thereof, and any vehicle parked thereon, and seize as evidence any hallucinogenic drug commonly known as STP (trade name DOM, chemically known as Methyl-Dimethoxy-Alpha-Methyl-Phenethylamine), narcotic, narcotic or drug paraphernalia, or other drugs illegal to possess by law, in order that the evidence may be procured to be used in the prosecution of such person or persons unlawfully possessing same.

JOSEPH CANALI, JR.

Sworn to and subscribed before me this 17th day of May, A. D., 1968.

JACK S. DADOMER,

Justice of the Peace Court
First District, Pinellas County
State of Florida.

IN THE

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT.

No. 30330.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DONALD RUTHERFORD McVEAN,
Defendant-Appellant.

PRAECIPE FOR TRANSMITTAL OF CERTIFIED COPY OF RECORD AND APPENDIX.

The Clerk of the above styled Court will please prepare and transmit to the Supreme Court of the United States so much of the record in the above styled Court as was not destroyed by fire. Petitioner has, this date, forwarded to the printer Petition for Certiorari to the said United States Supreme Court.

LEMUEL S. HUNNICUTT,
447 Third Avenue North,
St. Petersburg, Florida. 33701
Attorney for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1558

DONALD R. McVEAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. A1–A8) is reported at 436 F. 2d 1120.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1971. A petition for rehearing was denied on March 10, 1971. The petition for a writ of certiorari was filed on April 8, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a state search warrant, based on the sale of hallucinogenic drugs to an undercover police officer,

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was defective for want of state statutory authority, so that introduction of the fruits of the search was barred at petitioner's federal trial.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on a two-count information (returned in October 1969) charging that on May 17, 1968, he possessed and sold approximately fifteen capsules of STP, a hallucinogenic drug within the meaning of 21 U.S.C. 321(v)(3).[1] On June 2, 1970, he was sentenced to consecutive prison terms of one year on each count. The court of appeals affirmed, one judge concurring specially (Pet. A).

On May 13, 1968, Officer Joseph Canali, an undercover agent with the St. Petersburg, Florida police, purchased two STP tablets from petitioner at the latter's home in St. Petersburg (Tr. 68, 72, 148).[2] On May 17, 1968, on the basis of Canali's affidavit detailing the sale (Pet. A13–A14), a Florida justice of the peace issued a warrant authorizing a search of petitioner's residence for STP, for other illicit drugs and for drug paraphernalia; the warrant authorized the seizure of any such items found on the premises.[3]

On May 17, at petitioner's invitation, Officer Canali returned to the house. Petitioner and Canali went to

[1] "STP" is the popular name for methyl-dimethoxy-alpha-methyl-phenethylamine; "DOM" is the trade name.

[2] "Tr." refers to the one-volume trial transcript which we are lodging with the Clerk of the Court.

[3] We are lodging with the Clerk a copy of the warrant and the return listing the property taken.

the bedroom; petitioner there obtained fifteen STP capsules out of a Band-Aid box and sold them to Canali for $600. The marked currency by which Canali paid for the tablets was then divided between petitioner and a third party who was present during this transaction. This third party took the Band-Aid box to the den of the house. Shortly thereafter, acting by prearrangement with Canali, other local officers knocked at the door of the dwelling. When petitioner responded, he was informed that they had a search warrant; they then entered the house and arrested him. After petitioner was told that he was under arrest for sale of STP, the arresting officer recovered $260 in marked bills from petitioner's person. At that time, the other person present ran out of the house and was arrested by Canali (Tr. 84–85, 122–123).

In a subsequent search of the house, the officers found the Band-Aid box which contained additional STP capsules. At trial, the marked currency, the STP tablets sold to Canali on both occasions and the remaining tablets found in the Band-Aid box were introduced into evidence. In addition to Canali, four officers who executed the search warrant and arrested petitioner appeared as government witnesses.

ARGUMENT

The court below rightly concluded that the search and seizure was valid under state law and therefore that the items were properly admitted at petitioner's federal trial.[4] As its opinion shows, the warrant to

[4] Had this been a federal arrest and seizure from the outset, it plainly would have been compatible with the requirements of the Fourth Amendment irrespective of any warrant procedure. The

search petitioner's home comported with the requirements of the Florida statute delineating the conditions which permit the search of a private dwelling (Pet. A4–A6). Nor did the dismissal of the state prosecution taint the admissibility of this evidence in a federal court. The state proceedings were not terminated by any invalidity in the warrant; on the contrary, the state court specifically denied a motion to suppress the fruits of the search and seizure here in issue, finding that the warrant had been lawfully issued and properly executed.[5] We are advised by the United States Attorney that the state prosecution was dismissed for reasons wholly unrelated to the search (see the government's original brief in the court of

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purchase of the hallucinogenics on May 13 and 17, 1968, would have required no preexisting warrant authority. *Lewis* v. *United States*, 385 U.S. 206; see also, *United States* v. *White*, No. 13, this Term, decided April 5, 1971 (slip op. 4). Moreover, these events occurred prior to this Court's decision in *Chimel* v. *California*, 395 U.S. 752—deemed nonretroactive in *Williams* v. *United States*, No. 81, this Term, decided April 5, 1971. Accordingly, the agent making the purchase could have then-and-there arrested petitioner and seized the remaining drugs and the marked money (see Pet. A8).

[5] Petitioner also seems to be claiming that the dismissal of the state prosecution denied him a speedy trial. However, he makes no claim of specific prejudice; nor is there any suggestion of governmental overreaching or purposeful acts of delay. Cf. *Dickey* v. *Florida*, 398 U.S. 30. Nor, indeed, was the issue raised below until the petition for rehearing. In these circumstances, we perceive no reason to defer disposition of the instant petition until this Court decides *United States* v. *Marion*, No. 810, this Term.

appeals, particularly at pp. 11–13, which reprints the order of the state judge sustaining the warrant; we are lodging a copy of that brief herewith).

Petitioner argues, however, that the search was invalid under state law because the sale or possession of STP was not unlawful under the Florida Drug Abuse Law at the time that law was enacted, and therefore could not be made unlawful under state law by subsequent changes in federal law. Although the Florida statute extends its prohibitions to cover "any other drug to which the drug abuse laws of the United States apply * * *" (Section 404.01(3)), petitioner argues that the Florida legislature has no power generally to delegate to federal authorities authority to designate the types of hallucinogenic drugs which might in the future fall within the bar of its statute.

This contention presents no substantial federal question. The Florida statute—effective July 1, 1967—encompasses a wide variety of drugs; the chemical structure of some are almost identical to the one in issue here. The present compound was brought within the ambit of federal law in February 1968. The state legislature's reliance upon the expertise of the federal government to identify closely similar hallucinogenic drugs discovered by ongoing research is entirely legitimate and hardly comparable to the situation where the state legislature has attempted to authorize the federal government to fix substantive guidelines relating to matters of state policy. Cf. *Florida Industrial Commission* v. *State*, 21 So. 2d 599, 603, relied upon by petitioner. No issues of lack of notice or other questions of fairness are

involved. Cf. the Assimilative Crimes Act, 18 U.S.C. 13, sustained in *United States* v. *Sharpnack*, 355 U.S. 286.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1971.

No. 70-115.

DONALD R. McVEAN,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI AND FOR STAY OF MANDATE.

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Supreme Court of the United States

No. 70-115.

DONALD R. McVEAN,

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THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI AND FOR STAY OF MANDATE.

Petitioner, Donald R. McVean, respectfully prays that this Honorable Court grant his petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, heretofore submitted in this cause and as grounds therefor constituting intervening circumstances of substantial or controlling effect and substantial grounds available to petitioner although not previously presented, states the following:

POINT FOR REVIEW.

Petitioner Has Been Denied His Constitutional Privilege Against Double Jeopardy as Contained in the Fifth Amendment and Enforceable Against the States Through the Fourteenth Amendment.

REASON FOR GRANTING THE PETITION.

Petitioner Has Been Denied His Constitutional Privilege Against Double Jeopardy as Contained in the Fifth Amendment and Enforceable Against the States Through the Fourteenth Amendment.

"The Fifth Amendment guaranty against double jeopardy, which is enforceable against states through the Fourteenth Amendment, consists of three separate Constitutional protections: (1) protection against second prosecution for the same offense after acquittal; (2) protection against second prosecution for the same offense after conviction; and (3) protection against multiple punishments for the same offense." *North Carolina v. Pearce,* 395 U. S. 711, 23 L. Ed. 2d 656, 89 S. Ct. 2072.

It is protection number three (3) upon which petitioner relies in this petition.

"Consecutive trials might conflict with the due process guaranty if they involve 'fundamental unfairness'." *Hoag v. New Jersey* (1958) 356 U. S. 464, 2 L. Ed. 2d 913, 78 S. Ct. 829, reh. den. 357 U. S. 933, 2 L. Ed. 2d 1375, 78 S. Ct. 1366. *Benton v. Maryland,* 395 U. S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056. *Simpson v. Florida,* — U. S. —, 29 L. Ed. 2d 549, 91 S. Ct. —. *Stanley v. U. S.,* — U. S. —, 27 L. Ed. 2d 242, — S. Ct. —.

Was Petitioner Granted His Constitutional Guaranty of Due Process or Was His Persecution "Fundamental Unfairness"?

Petitioner, in his "STATEMENT OF THE CASE" contained in his Petition for Certiorari, stated that he was charged in the Circuit Court of the State of Florida with, *in addition to other charges,* selling and possession of an hallucinogenic drug. The "other charges" must here be noted.

From the short courtship of Police Officer Canali with petitioner (April and May of 1968), the petitioner was arrested and charged in State Court as follows:

1. Possession of marijuana on April 14, 1968. Directed verdict of acquittal.

2. Selling hashish on April 19, 1968. Jury trial resulted in "guilty" verdict. Petitioner sentenced to six months to five years in the State Penitentiary at hard labor.

3. Selling the identical hashish on the identical night of April 19, 1968 as set forth in number two (2) above. Dismissed by the State on June 6, 1968 after bond posted and premium therefor paid.

4. Possession of one-half of the same hashish "sold" in numbers two (2) and three (3) above on April 20, 1968. Tried by a jury on September 23, 1968 and found "not guilty".

5. Possession of marijuana on May 4, 1968. Tried by a jury on December 11, 1968 resulting in a "guilty" verdict. Petitioner sentenced to six (6) months to five (5) years in the State Penitentiary at hard labor, said sentence to run consecutively (sic) to prior sentence of six months to five years at hard labor.

6. Selling an hallucinogenic drug on May 13, 1968. Dismissed by the State on November 27, 1968 based on the holding in *Panzavecchia v. State,* D. C. A. 3rd Dist., Fla., 1967, 201 So. 2d 762, as pointed out by Justice Simpson in his special concurring opinion made a part of the Petition for Certiorari filed in this cause.

7. Possession of an hallucinogenic drug on May 17, 1968. Dismissed by the State for the same reason as number six (6) above on November 27, 1968. Filed in Federal Court nineteen months after the alleged offense occurred and part of the subject matter of this petition.

8. Sale of the identical hallucinogenic drug petitioner allegedly "possessed" in number seven (7) above. Dismissed the same as number six (6) and seven (7) above and filed in the Federal Court with number seven (7) above.

9. Possession of marijuana on May 17, 1968. Dismissed by the State.

10. The two cases here under consideration of "possession" and "sale" of the same hallucinogenic drug on May 17, 1968 in the Federal Court. The same as cases number seven (7) and eight (8) above. Numerous references to case number six (6) above sprinkled throughout the trial. Petitioner found guilty of both counts and sentenced to one year on each count with the sentences to run consecutively.

CONCLUSION.

"Fundamental unfairness" in the State's multifarious prosecutions of an accused is just as great a deprivation of an accused's constitutional privilege against double jeopardy as is the trying of an accused numerous times for one offense.

It takes many pages of truly abstract reasoning to hold that a person who "possessed" an object before he "sold" the same object has violated the peace and dignity of the state more than once.

For the reasons herein expressed, petitioner respectfully requests of this Honorable Court an order granting the writ of certiorari as heretofore requested and staying the mandate of this Court.

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CERTIFICATE OF COUNSEL.

I, the undersigned, herewith certify that the foregoing Petition is presented in good faith and not for delay and that said Petition is restricted to the grounds as set forth in Rule 58, Supreme Court Rules.

LEMUEL S. HUNNICUTT.

CERTIFICATE OF SERVICE.

Affidavit of Certificate of Service under separate cover.